

**Before the
Federal Communications Commission
Washington, DC 20554**

In the Matter of)	
)	
Petitions of SBC ILECs and)	
VarTec Telecom, Inc. For)	WC Docket No. 05-276
Declaratory Ruling Regarding)	
The Application Of Access Charges)	
To IP-Transported Calls)	
)	
Petition of Grande Communications, Inc.)	
For Declaratory Ruling Regarding Inter-)	WC Docket No. 05-283
Carrier Compensation for IP-Originated)	
Calls)	
_____)	

**REPLY COMMENTS IN WC DOCKET NO. 05-276
INITIAL COMMENTS IN DOCKET NO. 05-283
OF
BROADWING COMMUNICATIONS, LLC
AND
LEVEL 3 COMMUNICATIONS, INC.**

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SUMMARY

Some commenters have offered certain common law tort theories to support their arguments that intermediate carriers are liable for access charges to terminating LECs. Two of these theories are based on principles of agency and joint and several liability. As a general matter, these tort theories are inapplicable and the Commission should not entertain them. Even if it was appropriate to apply tort law, neither of these theories withstands scrutiny. There is no principal-agent relationship between carriers who cooperate in transporting telecommunications traffic because the key elements of this relationship are not present. Neither party has the right to control the conduct of the other, affect the legal relations of the other or to act as a fiduciary. Likewise, the elements necessary to establish joint and several liability are absent, since such liability is predicated upon an indivisible harm by parties acting in concert. Even in the rare circumstances in which multiple carriers have worked together to avoid access charges, it is easy to apportion the harm for access charge evasion, since this act is directly attributable to the last non-LEC carrier that delivers the traffic to the local exchange carrier(s).

Some commenters have also suggested that some intermediate carriers are liable for access charges because they have “constructively ordered” those services. This theory is also unavailing, because in the typical case it cannot be established that the intermediate carrier expects to receive access services, is in a position to refuse them or in fact receive access services at all.

In other comments, Verizon attempts to expand the scope of this proceeding and establish a toe-hold for its position that the net protocol conversion inherent in IP-to-PSTN interconnection may not be eligible for the ESP exemption from access charges. Verizon claims that this type of protocol conversion falls under the “new technology” exception. Verizon’s

argument, however, is based on a weak analogy and demonstrates either a misunderstanding of the nature of these protocol conversions or the technical underpinnings of the exception. As the Commission has determined on a number of occasions, IP-to-PSTN protocol conversions are “enhanced services” that are exempt from access charges. The Commission should not be drawn into this discussion because it is not appropriately raised in this proceeding and is being addressed in other more comprehensive dockets.

This filing also comprises the Initial Comments of Level 3 and Broadwing in WC Docket No. 05-283. Level 3 and Broadwing agree with Grande Communications that a LEC (or any intermediate carrier) should be able to rely on self-certification from its customer that the traffic originating from that customer is enhanced services, VoIP or other IP-enabled traffic that undergoes a net protocol conversion. To do otherwise would be unduly burdensome and would hinder technological innovation and market competition.

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Broadwing Communications, LLC (“Broadwing”) and Level 3 Communications, Inc. (“Level 3”), by undersigned counsel and in response to the Commission’s Public Notice released September 26, 2005,¹ offer their Reply Comments on the Petitions for Declaratory Ruling filed by the SBC ILECs and VarTec Telecom, Inc.

In addition, in response to the Commission’s Public Notice dated October 12, 2005,² Broadwing and Level 3 offer their Initial Comments on the Petition for Declaratory Ruling filed by Grande Communications, Inc. (“Grande Petition”).

¹ *Pleading Cycle Established for SBC’s and VarTec’s Petitions for Declaratory Ruling Regarding the Application of Access Charges to IP-Transported Calls*, WC Docket 05-276, Public Notice (Sept. 26, 2005).

² *Pleading Cycle Established for Grande Communication, Inc.’s Petition for Declaratory Ruling Regarding Intercarrier Compensation for IP-Originated Calls.*, WC Docket No. 05-283, Public Notice (Oct. 12, 2005).

I. LECs AND INTERMEDIATE CARRIERS SHOULD NOT BE GUARANTORS REGARDING THE NATURE OF RECEIVED TRAFFIC.

Level 3 and Broadwing agree with Grande that a LEC (or any intermediate carrier) should be able to rely on self-certification from its customer that the traffic originating from that customer is enhanced services, VoIP or other IP-enabled traffic that undergoes a net protocol conversion. Based on that assurance, it should then be able to transmit that traffic to subsequent carriers accordingly.³ As Level 3 maintained in its Comments in this proceeding⁴ and expands upon in these Reply Comments,⁵ it is highly impractical, unreasonable, and against public policy to expect a carrier to police its many customers and act as a guarantor regarding the nature of any customer's traffic. Besides being unduly burdensome, it shifts the burden of proof from terminating LECs, which by common law have the duty to establish that they have been affirmatively harmed,⁶ to intermediate carriers which will then have the duty to "prove a negative" and endlessly establish that they are *not* causing harm. Besides being contrary to basic principles of the law, this is grossly unfair to the intermediate carriers, who must now establish that no carrier in the chain perpetrated a fraud and/or caused a terminating LEC harm. This is poor public policy because the ongoing potential liability will create an overhanging threat to IP-enabled carriers which will have a depressive affect on the business of IP-enabled carriers and be a long-term obstacle to technological innovation and competitive provision of broadband services.

³ Grande Petition at 25.

⁴ *SBC's and VarTec's Petitions for Declaratory Ruling Regarding the Application of Access Charges to IP-Transported Calls*, WC Docket 05-276, Comments of Level 3 Communications, Inc. at 13 (Nov. 10, 2005), attached hereto as Exhibit 1. Level 3 and Broadwing ask that these Comments now be incorporated into the record of the Grande proceeding, WC Docket No. 05-283.

⁵ *Infra* p. 5.

⁶ Restatement (Second) of Torts § 433 B.

II. COMMON LAW PRINCIPLES OF JOINT LIABILITY DO NOT APPLY

Several commenters have raised theories of liability (e.g. agency, joint and several liability) that are grounded in tort law, not contract law. These theories are out of place in discussions of business relationships that are based solely on contracts or regulations (i.e. Part 69), and the Commission should not entertain these new concepts as part of a proceeding devoted to interpretations of existing access charge rules. As explained further in this section, even if tort theories were appropriate for Commission consideration, the required factual elements are not present to support those theories. Moreover, the weakness of these tort theories cannot be remedied through tariff revisions, because they would conflict with existing rules and require such a divergence from the common understanding of these torts as to comprise an unjust and unreasonable practice.

A. Connecting Carriers Are Not Jointly and Severally Liable for Access Charges.

A number of commenters assert that the various carriers involved in interexchange transmission are jointly and severally liable for any access charges, and that if those charges are avoided, an “indivisible harm” has been perpetrated, for which all are liable. For example, SBC asserts that an IP-based transmission provider and the carrier that delivers the call to the IP-based provider (e.g., VarTec) are both liable for the applicable access charges.⁷ SBC cites the Second Restatement of Torts as authority for the statement that “each of two or more persons whose tortious conduct is a legal cause of a single and indivisible harm to the injured party is subject to liability to the injured party for the entire harm.”⁸ Qwest is in general agreement, contending that the originating IXC, any intermediate IXCs, the last party delivering the call to the local exchange access provider(s) (hereinafter referred to by Level 3 and Broadwing as the “delivering

⁷ SBC Comments at 16.

⁸ *Id.*

carrier”) and any other carrier “involved” in the unlawful scheme to improperly divert access traffic into the local network are jointly and severally liable for access charges.⁹ USTA advances the colorful argument that telecommunications common carriage is analogous to the passing of commercial paper, complete with “holders in due course” who may travel back through the chain of holders to obtain satisfaction.¹⁰

However, a review of the law establishes that joint and several liability is inapplicable. The common law of torts holds that the two important elements of joint and several liability are 1) a *single and indivisible* harm to the injured party, 2) resulting from an act *in concert* with others.¹¹ In all cases at issue in this proceeding, the first element is never met and the second one rarely.

Without sharing its underlying analysis, SBC labels the harm of avoided access charges as *prima facie* indivisible,¹² but this assumption does not withstand scrutiny. While there are many types of harm that are considered indivisible, such a determination is made only after an injury has been found “incapable of any logical, reasonable or practical division”¹³ by the prescribed methods.¹⁴

Fortunately, in the case of unpaid access charges it is, in fact, a trivial matter to assign liability to a single entity, since the harm occurs at a distinct place and time. The terminating

⁹ Qwest Comments at 16. Verizon goes so far as to extend liability beyond the delivering carrier onto the local exchange itself, stating that when an IXC contracts with a CLEC to hand off the traffic to an ILEC for delivery both the IXC and the CLEC are jointly and severally liable to the ILEC for access charges. Verizon Comments at 8. However, no party really develops its case for CLEC liability, and, as Level 3 showed in its Initial Comments, the CLEC is a joint provider of access services that should not be held liable for any access charges that may be due from the delivering carrier.

¹⁰ USTA Comments at 8.

¹¹ Restatement (Second) of Torts §§ 875, 876.

¹² SBC Comments at 16.

¹³ Restatement (Second) of Torts § 433A cmt. i.

¹⁴ *Id.* § 433A(2).

LEC (or LECs) merely need to look at the other end of the interconnection trunks to determine the identity of the party that delivered *all* of the offending traffic. This is the contractual customer, and this is the party which is obligated to designate the proper jurisdiction of the delivered traffic. Moreover, the source of the harm occurs at a severable (albeit miniscule) point in time, which the Restatement cites as another example of divisibility.¹⁵

SBC has cited *Louisville & Nashville R.R. v. Sloss-Sheffield Steel & Iron Co.*¹⁶ as supporting its concept of joint and several liability.¹⁷ Ironically, that case is more supportive of Level 3's and Broadwing's position in this matter. While *Louisville* did apply joint and severable liability to carriers who *expressly agree* to tariff excessive joint rates to end users, it also affirmed that this "does not make connecting carriers partners and that each does not become liable like a partner for every tort of any of the others engaged in the common enterprise. *Each connecting carrier is liable only for its own act.*"¹⁸ This applies to the majority of situations at issue in this proceeding, where an originating and/or intermediate carrier has arranged for local access with the last party delivering the call ("delivering carrier") to the local exchange access provider(s). It is no more reasonable to expect an originating or intermediary carrier to accept liability for a delivering carrier's acts, such as mislabeling traffic, than it would be to expect Amazon.com to accept liability when UPS damages the recipient's loading dock. The harmful act is attributable to the delivering carrier, which is liable for its own act, and it is this carrier only from which a remedy can be obtained.

Even if the Commission were to find that the avoided access charges are an indivisible harm, the aggrieved LECs would still need to establish the second element, that the carriers were

¹⁵ *Id.* § 433A cmt. c.

¹⁶ 269 U.S. 217 (1925) ("*Louisville*").

¹⁷ SBC Comments at 16.

¹⁸ 269 U.S. at 232 (citations omitted)(emphasis supplied).

acting in concert to avoid these charges. It is not enough to simply impute cooperative action to all carriers in the chain of transmission. Mere business dealings do not comprise a concerted effort. Rather, parties are not acting in concert unless “they act in accordance with an agreement to cooperate in a particular line of conduct or to accomplish a particular result.”¹⁹ While it is possible that two or more carriers might concoct a plan with the “particular result” of avoiding access charges, it is even more likely that a carrier would simply solicit bids for termination of long distance traffic for the “particular result” of achieving the lowest practicable cost. In the latter situation, the intermediate carrier is not specifically intending to avoid access charges, or harm the LEC in any other way, and it would be contrary to established law to impose liability on that carrier for the unlawful conduct of the delivering carrier. For that reason, the Commission must not create a blanket presumption of joint and several liability among carriers.

B. A Principal-Agent Relationship Does Not Exist Between Connecting Carriers.

In its comments, Frontier attempts to parlay a simple connecting carrier arrangement into a principal-agent relationship.²⁰ Frontier misunderstands the nature of this special relationship. The accepted definition of the principal-agent relationship is “the fiduciary relation that results from the manifestation of consent by one person to another that the other shall act on his behalf and submit to his control, and consent by the other so to act.”²¹ Some of the important features of this relationship are:

- The agent acts on the principal’s account and the principal has the right to control the conduct of the agent with regard to the matters entrusted to him;²²
- The agent has the power to alter legal relations between the principal and third persons, creating rights and liabilities;²³

¹⁹ Restatement (Second) of Torts § 876 cmt. a.

²⁰ Frontier Comments at 5.

²¹ Restatement (Second) of Agency § 1.

²² *Id.* § 1 cmt. e, § 14.

- The agent is a fiduciary with respect to matters within the scope of his agency.²⁴

None of these features exist in the standard connecting carrier arrangement. In reality, almost all interconnection agreements have language that specifically disclaims any agency relationship between the interconnecting carriers. Except in the rare case of affiliate transactions, an originating or intermediary carrier has absolutely no say in the manner in which a delivering carrier fulfills its common carrier duty, so long as the traffic is delivered in accordance with the agreement between the parties. Moreover, the delivering carrier has no power to affect the legal relations between the originating or intermediary carrier and any other parties. It does not negotiate on behalf of any other carrier, it does not establish accounts on behalf of any other carrier, it makes no payment arrangements on behalf of any other carrier, and it makes no representations on behalf of any other carrier. It merely delivers traffic to a terminating LEC in accordance with a two-party agreement or tariff between the LEC and itself. Finally, the connecting carrier is by no means a “fiduciary,” as in “a person in the character of a trustee . . . in respect to the trust and confidence involved in it and the scrupulous good faith it requires.”²⁵ Instead, the connecting carrier is a service supplier in an arms-length transaction, operating solely in its own best interests.

The law is clear that this type of relationship is *not* a principal-agent relationship. “A person who contracts to accomplish something for another or *to deliver* something to another, but who is not acting as a fiduciary for the other, is a non-agent contractor.”²⁶ That is precisely the nature of most of the connecting carrier relationships at issue in this proceeding. The parties

²³ *Id.* § 12, cmt. a.

²⁴ *Id.* § 13

²⁵ Blacks Law Dictionary 625 (6th ed. 1990).

²⁶ Restatement (Second) of Agency § 14 L (emphasis supplied).

are independent contractors conducting business with each other in accordance with well established common carrier principles. No principal-agent relationship exists and, consequently, there is no basis for shared liability among connecting carriers.

III. IP-ENABLED SERVICES DO NOT FALL WITHIN THE “NEW TECHNOLOGY” EXCEPTION TO THE ESP EXEMPTION.

In its comments, Verizon asserts that the PSTN-to-PSTN services at issue in this proceeding do not involve a net protocol conversion, but even if they did, such services would be subject to access charges. Verizon implies that an IP conversion is merely a “piecemeal” conversion necessitated by the introduction of new technology in order to maintain compatibility with the existing network.²⁷ Verizon offers little support for its assertion, arguing only that the exception applies because IP-in-the-middle traffic is “directly analogous” to end office analog to digital conversion that permits an analog terminal to connect to a digital switch, and that IP conversion is merely required to enable IP terminals to communicate with traditional PSTN devices.²⁸

As an initial matter, it is curious that Verizon has broached this topic at all, since it is clear that the SBC-VarTec Petitions are focused on PSTN-to-PSTN “IP-in-the-middle” services. Net protocol conversion is not one of the issues raised by this proceeding, and is in fact being addressed more appropriately in other open proceedings.²⁹ Ordinarily, Level 3 and Broadwing would simply ignore this attempt to raise new issues without proper notice, but the implications of Verizon’s interpretation are so alarming that Level 3 and Broadwing are compelled to address them here. Verizon’s assertion is incorrect for at least four reasons.

²⁷ Verizon Comments at 5.

²⁸ *Id.*

²⁹ *See* Level 3 Comments at 5.

A. IP-Enabled Services Do Not Fall Within the Recognized Scope of the Exception.

The Commission has recognized that the “new basic network technology” exception carves out only those services “which require[] protocol conversion to maintain compatibility with existing CPE [customer premises equipment].”³⁰ The Commission has ruled that this type of compatibility requirement “arises when innovative basic network technology is introduced into the network in a piecemeal fashion, and conversion equipment is used in the network to maintain compatibility with CPE.”³¹ Thus, the exception is designed to cover “carrier-provided end office” conversions that permit outdated equipment (such as analog CPE) to interact with modernized infrastructure (such as an all-digital network).³²

Level 3 and Broadwing emphasize that net protocol conversions related to IP-enabled services do not fall within this scope, and, indeed, Verizon’s argument turns this exception on its head. The limited purpose of the “new basic technology” exception was to allow the Bell System (pre-divestiture) and the Bell Operating Companies (post-divestiture) to introduce new network technologies, such as digital end offices, into their network and convert signals into analog format when necessary to allow their customers to use existing analog CPE.³³ Without this exception, the Bell System (and the BOCs) could never have modernized its own network

³⁰ *Implementation of the Non-Accounting Safeguards of Section 271 and 272 of the Communications Act of 1934, as amended*, First Report and Order and Further Notice of Proposed Rulemaking, 11 FCC Rcd 21905, 21956 para. 106 (1996)(“*Non-Accounting Safeguards Order*”).

³¹ *Independent Data Communications Manufacturers Association, Inc. Petition for Declaratory Ruling That AT&T's InterSpan Frame Relay Service Is a Basic Service; and American Telephone and Telegraph Company Petition for Declaratory Ruling That All IXCs be Subject to the Commission's Decision on the IDCMA Petition*, Memorandum Opinion and Order, 10 FCC Rcd 13717, 13719 para. 15 (1995).

³² *Amendment to Sections 64.702 of the Commission's Rules and Regulations (Third Computer Inquiry)*, Report and Order, 2 FCC Rcd 3072 para. 70 (1987)(“*Computer III Phase II Order*”).

³³ *See id.*

without changing all attached CPE in order to avoid any protocol conversions. Otherwise, the protocol conversions would have been considered “information services,” and the Bell System would have forced to provide such services through a separate subsidiary under *Computer II* or subject to the *Computer III* non-structural safeguards.

Thus, in adopting the “new basic technology” exception, the Commission sought to ensure that it did “not create disincentives for introduction of new technology.”³⁴ To ensure that the exception did not swallow the underlying rule (*i.e.*, services that perform protocol conversions are enhanced services), however, the Commission limited the exception to “circumstances involving no change in an existing service, but merely a change in electrical interface characteristics to facilitate transitional introduction of new technology.”³⁵

As an example, IP-to-PSTN services, as offered by Level 3, Broadwing and other IP-enabled service providers, engage in protocol conversions not to ensure compatibility between the network provider and their customers’ aging CPE, but rather to allow compatibility among multiple networks. More fundamentally, IP technology enables advanced, enhanced features that are not possible with ordinary circuit switching, which further necessitates the protocol conversion.

³⁴ *Communications Protocols under Section 64.702 of the Commission’s Rules and Regulations*, Memorandum Opinion, Order, and Statement of Principles, 95 FCC2d 584, 591-92 para. 17 (1983)(“*Protocols Order*”); *see also id.* para. 3 (considering “whether carriers subject to *structural* separation of basic and enhanced offerings and related facilities should be permitted to associate code and protocol conversion capabilities with facilities used to support the offering of basic service”); *Computer III Phase II Order* para. 65 (explaining that the Commission “designed this exemption to codify [its] original finding . . . that [it] would favor waiver applications seeking to remove such conversions from the enhanced service category.”).

³⁵ *Protocols Order* para. 17; *see also Integrated Services Digital Networks (ISDN)*, 98 FCC2d 249 para. 40 (1984) (“[I]n circumstances involving no change in an existing service, but merely a change in electrical interface characteristics to facilitate the transitional *introduction* of new technology, we resolved to act favorably and expeditiously on petitions for waiver of the Computer II requirements to ensure than new technology to implement an existing service can and will be employed.”).

These and other IP-enabled services do not fall into the narrow set of circumstances that the Commission included in the exception. Contrary to the limited purpose behind the exception, IP-enabled services *do* involve a change away from the existing circuit-switched service, and they offer far more than “merely a change in electrical interface characteristics to facilitate transitional introduction of new technology.”³⁶

B. IP-Enabled Services Do More than Connect Old and New Transmission Technologies.

Verizon’s interpretation of the exception appears so broad that it ignores the enhanced functionalities that IP-enabled services provide. IP-enabled service offers its users a wide array of advanced IP-based functionalities that bear no resemblance whatsoever to basic service.³⁷ Many IP-enabled communications services provide the same slate of “computing capabilities” that led the Commission to conclude that Pulver’s Free World Dialup (“FWD”) is an information service.³⁸ For instance, the IP-enabled communications services offered by Level 3, Broadwing and other carriers allow users to store numbers and voicemail messages on the carriers’ servers and to make them available to other IP-enabled communications users. In addition, users of Level 3’s services must use a username and password to register for the service, to make

³⁶ *Protocols Order* para. 17 (limiting the exception to “circumstances involving no change in an existing service, but merely a change in electrical interface characteristics to facilitate transitional introduction of new technology.”).

³⁷ See *Level 3 Communications LLC Petition for Forbearance Under 47 U.S.C. § 160(c) and Section 1.53 of the Commission’s Rules from Enforcement of 47 U.S.C. § 251(g), Rule 51.701(b)(1), and Rule 69.5(b)*, WC Docket No. 03-266, at 11-20 (filed Dec. 23, 2003) (describing advanced features such as advanced teleworking services, multimedia conferencing, advanced call centers, unified messaging, call management and screening, find-me follow-me service, location scheduling, and simplified relocation).

³⁸ *Petition for Declaratory Ruling that Pulver.com’s Free World Dialup is Neither Telecommunications Nor a Telecommunications Service*, Memorandum Opinion and Order, 19 FCC Rcd 3307 para. 11 (2004).

outgoing calls,³⁹ and to access online features. Like FWD, Level 3's services use Session Initiation Protocol ("SIP") to determine the availability of IP-based callers and IP-based call recipients, and they offer network address translation solutions. And, finally, the platforms that support Level 3's and Broadwing's services have the capability to determine whether other IP-enabled end users are online at any particular time.

C. Verizon's Theory Ignores the Statutory Underpinnings of the Exception.

The Commission has explained that the "new basic network technology" exception and the other two protocol conversion exceptions reflect the statutory definition of information services, which expressly excludes a capability "used 'for the management, control, or operation of a telecommunications system or the management of a telecommunications service.'"⁴⁰ The use of IP is *not* limited to the management or operation of telecommunications systems or services (by, for instance, sending switching signals that assist in routing a circuit-switched call). To the contrary, IP-enabled services are stand-alone communications services that offer enhanced functionalities that cannot be performed on circuit-switched networks.

D. Verizon's Theory is Overbroad.

Verizon argues that IP conversion falls within the "new technology" exception because "carrier-provided protocol conversions are needed to permit IP terminals and equipment and TDM terminals and equipment to communicate with one another."⁴¹ This interpretation of the "new technology" exception is so broad that it would encompass *every* service that entails a protocol conversion. Indeed, all protocol conversion services enable interaction between devices

³⁹ When a user originates an IP communication from a PC, the user inserts the username and password manually. When a *user* originates an IP communication from an analog handset, attached customer premises equipment provides the username and password automatically.

⁴⁰ *Non-Accounting Safeguards Order* para. 106 (quoting 47 U.S.C. § 153(20)).

⁴¹ Verizon Comments at 5.

that operate with different protocols. That is what protocol conversion is for; if every device operated on the same protocol, there would be no need for any conversion. Thus, if the exception extends to the IP services at issue in this proceeding, as Verizon contends, then it must also extend to every other protocol conversion, essentially eliminating the Commission's long-recognized rule that protocol conversion services are information services.

IV. THE CONSTRUCTIVE ORDERING DOCTRINE DOES NOT APPLY TO INTERMEDIATE CARRIERS.

In their comments, Qwest and SBC claim that the intermediate carriers are liable for access charges because they have constructively ordered terminating access services from the LEC.⁴² This is incorrect, however, because the relationships among the cooperating carriers are at odds with the facts that gave rise to the doctrine as it applies to telecommunications.

The doctrine of constructive ordering arose from *United Artists Payphone Corp. v. New York Tel. Co.*⁴³ In that case, the FCC looked beyond the definition of "ordering" found in the carrier's tariff to determine whether United Artists was AT&T's "customer." If so, United Artists would be required to pay the tariffed rate. In that case, the FCC concluded that if United Artists "failed to take steps to control unauthorized [charges, it] could reasonably be held to have constructively ordered services from [the carrier]."⁴⁴ Thus, under the constructive ordering doctrine, a party "orders" a carrier's services when it (1) is interconnected in such a manner that it can expect to receive access services; (2) fails to take reasonable steps to prevent the receipt of access services; and (3) does in fact receive such services.

For the constructive ordering doctrine to apply to the intermediate carrier, that intermediate carrier (*i.e.*, the carrier one step removed from the LEC) would need to be

⁴² Qwest Comments at 18; SBC Comments at 2.

⁴³ 8 FCC Rcd 5562 (1993)

⁴⁴ *Id.* at 5563 (emphasis added).

interconnected to the ILEC in a manner that would cause that carrier to believe it could expect to receive access services from the LEC, and then the intermediate carrier would have to fail to take steps to prevent the receipt of access services, and finally in fact receive access services.

However, as explained previously,⁴⁵ the intermediate carrier has most likely contracted for general call completion services from the delivering carrier, rather than “access” *per se*. When an intermediate carrier is so indirectly associated with a terminating LEC, it cannot be considered to have requested or received “access services” from the LEC, and thus cannot have constructively ordered those services.

V. CONCLUSION

Common law theories of joint liability are not applicable to disputes regarding access charge evasion. Theories such as joint and several liability, agency, or constructive ordering cannot be shoe-horned into this situation because the required factual elements are absent. The obligations of carriers that interconnect to the local exchange network are grounded in contract or tariff, and LECs should seek remedies accordingly.

Arguments seeking to expand this proceeding to restrict the availability of the ESP exemption are also out of place. This docket is limited to PSTN-to-PSTN services and the Commission should dismiss out of hand Verizon’s suggestion that IP-PSTN services should be addressed. The Commission is examining the classification, and treatment, of IP-enabled services in its comprehensive rulemaking docket and that docket is the appropriate forum to resolve IP-PSTN traffic issues.

Finally, Level 3 and Broadwing agree with Grande that a LEC (or any intermediate carrier) should be able to rely on self-certification from its customer that the traffic originating

⁴⁵ *Supra* p. 6.

from that customer is enhanced services, VoIP or other IP-enabled traffic that undergoes a net protocol conversion. To do otherwise would be unduly burdensome and would hinder technological innovation and market competition.

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